

**NATHAN W. CHLUMSKY**

V.

Respondent

AND

Insurance Carrier

<sup>1</sup> Formerly Docket No. 1,057,368.

In his brief, claimant states:

In this specific instance, respondent agreed to a financial amount owed to claimant. The agreement was beneficial to them, and claimant's request for payment does not exceed the amount agreed to.

There is no merit to the fact that respondent did not "pre-approve" a specific way the money was to be spent. The plan was already in place and agreed to. Respondent should not collect a windfall based on the unforeseen and unavoidable circumstances surrounding claimant's surgery.<sup>2</sup>

Respondent contends Judge Moore's denial of payment for the hotel expenses should be affirmed.

The issue is: to what travel expenses is claimant entitled?

#### **FINDINGS OF FACT**

Claimant suffered a work injury to his left shoulder on July 1, 2011. In a December 20, 2013, Order, the Board found claimant was entitled to future medical benefits. Since then, claimant has filed several applications for post-award medical benefits.

Claimant, because of his work accident, underwent a left total shoulder arthroplasty in June 2015. Following the surgery, claimant experienced chronic itching and, in November 2018, developed a rash. Dr. Craig Satterlee was authorized to treat claimant. Part of the artificial joint in claimant's left shoulder was chrome, which contained nickel. Claimant was determined to be allergic to nickel. Dr. Satterlee was authorized to replace that part of the artificial joint that contained nickel.

In preparation for his surgery by Dr. Satterlee, claimant was scheduled for a pre-operative consultation at the North Kansas City Hospital (the hospital) on Monday, May 20, 2019. He was to undergo surgery the next day, May 21, at 11 a.m.

Claimant's original plan was to travel from his home in Bartlesville, Oklahoma, to Chanute, Kansas, and stay at his sister's home and travel the next day to his pre-operative appointment at the hospital. Following the appointment, he would travel back to Chanute and spend the night with his sister. The next day, he and his mother would travel back to the hospital for the surgery. Following the surgery, he and his mother would return to

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<sup>2</sup> Claimant's Brief at 5 (filed Oct. 21, 2019).

Chanute and he would eventually return to Bartlesville. On April 8, 2019, claimant's attorney sent an email to this effect to respondent's attorney. The email stated:

My client advises in part:

***I got an email from Dr. Satterlee's nurse, Jaime. She said that the joint is done and they should get it next week or the following week. At this time we are planning to do a pre-op Monday May 20th and surgery will be Tuesday May 21st. My mom will be with me to drive so what we will probably do is drive to Kansas City for the pre-op and then drive back to Chanute and stay at my sister's rather than get a motel.***<sup>3</sup>

Respondent did not reply to the email from claimant's attorney. The parties agree that had claimant stuck to his original travel plan, he would be entitled to \$539.03 in travel expenses.

On May 19, claimant traveled from Bartlesville to Chanute, a distance of 85.8 miles, and stayed overnight with his sister. He did so in order to avoid getting up extremely early and driving a long distance in one day to his appointment. When he left for Kansas City on May 20, his mother and sister accompanied him because his sister had business in Kansas City. The distance from Chanute to the hospital is 127 miles.

While at his pre-operative consultation with Dr. Satterlee, claimant was asked if he would be willing to move his operation to an earlier time the next day, May 21. With the earlier surgery, claimant thought he might be able to go home the same day as the surgery and so he agreed.

The evening of May 20, claimant stayed in one room and his mother and sister stayed in another room at the Harrah's Casino hotel, in part, because of the time change for claimant's surgery and because Harrah's was close to the hospital. His room rent was \$128.23. Claimant confirmed he did not get prior authorization from respondent to stay in a hotel. Another extenuating circumstance for staying overnight at the hotel was the fact that claimant's sister learned there was flooding in Chanute and some roads were closed, including part of the highway going into Chanute.

In the early morning hours of May 21, claimant's operation took place and he remained in the hospital until the next day, May 22. He was not permitted to go home on May 21, as planned, because of potential complications. The evening of May 21, claimant's sister and mother stayed a second night at Harrah's. After being discharged from the hospital on May 22, claimant was driven home because he was not permitted to drive.

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<sup>3</sup> Claimant's Depo. (July 23, 2019), Resp. Ex. A.

On May 28, claimant's attorney sent respondent's attorney a letter requesting reimbursement of \$467.03 for travel expenses, which included reimbursement for traveling 425.6 miles from Bartlesville to Chanute to the hospital and back and for two nights at Harrah's.

A dispute arose over what travel expenses claimant should receive from respondent. Claimant asserts he had an agreement with respondent to be paid \$539.03 in travel expenses and he should be paid that amount. Respondent asserts there was no agreement and it owes claimant mileage for one trip to and from the North Kansas City Hospital and \$15 per diem per day. The state reimbursement rate in May 2019 was \$.545 per mile. Under respondent's theory, per the Board's calculation, claimant is entitled to \$231.95 for mileage and \$15 per diem for two days, or a total of \$261.95. Respondent asserts it has paid claimant the travel expenses to which he is entitled, presumably \$261.95.

The parties entered into a written stipulation on July 23, 2019, that the only issue was whether claimant should be reimbursed for motel expenses. The stipulation further provided that the only evidence to be submitted was claimant's July 23 evidentiary deposition and exhibits thereto, that the matter was deemed submitted by the parties on August 1, 2019, and claimant retained the right to seek post-award attorney fees.

The judge ruled:

Chlumsky had his surgery on May 21, 2019 as expected, but he was not [released] until May 22, 2019, as he was kept overnight on an antibiotic drip, to avoid infection. That overnight stay led to an additional night for his mother and sister at the Kansas City hotel. Chlumsky originally expected to submit a mileage claim that would have been greater than the two nights of hotel expenses (Bartlesville to Kansas City, Kansas City to Chanute, Chanute to Kansas City, and Kansas City to Bartlesville), and argues that it is only fair that the respondent and Fund reimburse his family for those costs, especially since the mileage claim actually submitted was lower than anticipated.

The respondent and the State Self-Insurance Fund do not dispute those facts, but argue that their responsibility to Chlumsky is prescribed by the Workers Compensation Act to mileage to and from the medical treatment and a *per diem* of \$15.00 per day to offset the expenses of staying overnight (twice).

**K.S.A. 44-510h(a)** prescribes the duty of an employer to provide reasonable and necessary medical care, including the cost of transportation to and from that care:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches,

apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

**K.S.A. 44-515(a)** further provides

If the employee is notified to [submit to] an examination before any health care provider in any town or city other than the residence of the employee at the time that the employee received an injury, the employee shall not be required to submit to an examination until such employee has been furnished with sufficient funds to pay for transportation to and from the place of examination at the rate prescribed for compensation of state officers and employees under K.S.A. 75-3203a, and amendments thereto, for each mile actually and necessarily traveled to and from the place of examination, any turnpike or other tolls and any parking fees actually and necessarily incurred, ***and in addition the sum of \$15 per day for each full day that the employee was required to be away from such employee's residence to defray such employee's board and lodging and living expenses.***

(Emphasis added.)

Respondent has authorized and paid the round trip mileage for Chlumsky's surgery, and has offered to pay the ***per diem*** for the days he was required to be away from home for his surgery. It has declined to pay the housing expenses for Chlumsky's mother or sister. Chlumsky's housing for the night of May 21-22, while he remained in the hospital, was paid as part of the medical procedure.

The Act prescribes the respondent's duty to provide medical care and transportation to and from that medical care. The Act does not impose upon the respondent, its insurance carrier or the Self-Insurance Fund the obligation to pay Chlumsky's motel expenses, other than the per diem of \$15.00 per day "to defray" the employee's board and lodging and living expenses. Had the legislature intended the employer to bear the entire cost of the employee's out-of-town stay, including housing and meals, it could have done so. Instead, the legislature required only that the employer contribute \$15.00 per day towards those expenses. See ***Floyd Dennis Clark v. Eaton Corporation, Docket No. 1,052,143/CS-00-0172-544 (WCAB, July 12, 2016)***. The Act does not impose upon the respondent employer, its insurance carrier or the Self-Insurance Fund the obligation to pay ***any*** of the expenses of the employee's family members.

Chlumsky's post-Award demand for payment of his mother's and sister's hotel expenses, incurred while he was undergoing authorized treatment, is **CONSIDERED**, but **DENIED**.<sup>4</sup>

### **PRINCIPLES OF LAW AND ANALYSIS**

If the Board's calculations are correct, the parties are arguing over less than \$300. As a result of their dispute, the parties took claimant's deposition, presented oral argument to the Board and may hold a future hearing over attorney fees.

As noted above, claimant asserts he entered into an agreement with respondent to be paid \$539.03 for travel expenses and the judge should have enforced that agreement. Claimant acknowledges respondent did not respond to the email setting forth claimant's original travel plans. Respondent disputes there was ever an agreement and asserts that even if there was such an agreement, travel expenses are set by statute.

The Board finds there was no agreement between the parties that claimant was to be paid \$539.03 by respondent for several reasons. First, the email from claimant's attorney to respondent's attorney says "what we will **probably** do is drive to Kansas City for the pre-op and then drive back to Chanute and stay at my sister's rather than get a motel."<sup>5</sup> (Emphasis added.) From this statement, it is obvious that claimant's plans were not etched in stone and might change.

Second, there was no offer by claimant in the email sent by his attorney. Nothing in the email requests that claimant be paid \$539.03 for his proposed travel. Even if there was an offer, respondent did not accept said offer. If the alleged agreement between the parties was an express agreement, then the alleged written offer was the email and respondent made no written acceptance. If the alleged agreement was implied by the parties, respondent took no action to accept claimant's offer. In *Kirk*,<sup>6</sup> the United States Court of Appeals, Tenth Circuit stated:

This court has said that the elements of an express and implied contract are the same. The difference between them is one of proof. The express contract is proven by testimony showing the promise and the acceptance, whereas the implied contract is inferred from the acts of the parties and other circumstances showing an intent to contract. See *Woodruff v. New State Ice Co.*, 197 F.2d 36 (10th Cir. 1952) (opinion by Murrah, J.).

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<sup>4</sup> Judge's Post-Award Medical Order (Sept. 11, 2019) at 2-3.

<sup>5</sup> Claimant's Depo. (July 23, 2019), Resp. Ex. A.

<sup>6</sup> *Kirk v. U.S.*, 451 F.2d 690, 695 (10th Cir. 1971).

Nor was there a reasonable expectation from claimant that respondent would pay \$539.03 for his tentative travel plans. The email merely informed respondent of claimant's tentative travel plans. In *Bouton*,<sup>7</sup> the Kansas Court of Appeals stated:

Promissory estoppel and contract law are closely related and serve the same fundamental purposes by providing means to enforce one party's legitimate expectations based on the representations of another party. Restatement (Second) of Contracts § 90, comment a (noting the section outlines what is often termed "promissory estoppel" and is conceptually designed to protect legitimate reliance interests). A contract typically depends upon mutual promises that entail an exchange of bargained consideration. *M West, Inc. v. Oak Park Mall*, 44 Kan. App. 2d 35, 49, 234 P.3d 833 (2010) (noting that offer, acceptance, and consideration constitute "all the components of a valid contract"). For example, A agrees to pay B \$500 if B overhauls the engine of A's car. If B does the work and A refuses to pay, B may sue for breach of contract, thus enforcing his legitimate expectation. B's promise to work on the engine is consideration for A's promise to pay and vice versa. Promissory estoppel commonly applies when a promise reasonably induces a predictable sort of action but without the more formal mutual consideration found in contracts. Thus, A says he or she will not foreclose the mortgage on B's land for a specified period. So B makes significant improvements to the land. A may not then foreclose during that time. See Restatement (Second) of Contracts § 90, ill. 2.

Kansas courts have explained that a party's *reasonable* reliance on a promise prompting a *reasonable* change in position effectively replaces the bargained for consideration of a formal contract, thereby creating what amounts to a contractual relationship. *Berryman v. Kmoch*, 221 Kan. 304, 307, 559 P.2d 790 (1977); see *Mohr*, 244 Kan. at 574-75, 770 P.2d 466; *Greiner v. Greiner*, 131 Kan. 760, 765, 293 Pac. 759 (1930). To the extent the promisee relies on equity to specifically enforce the promise or recover damages equivalent to the promised performance, the promise itself must define with sufficient particularity what the promisor was to do. See *Owasso Dev. Co. v. Associated Wholesale Grocers, Inc.*, 19 Kan. App. 2d 549, 550-51, 873 P.2d 212, *rev. denied* 255 Kan. 1003 (1994) (suggesting Kansas law requires a promise containing all essential elements). That is a common view. *Ruud v. Great Plains Supply, Inc.*, 526 N.W.2d 369, 372 (Minn. 1995); *Keil v. Glacier Park, Inc.*, 188 Mont. 455, 462, 614 P.2d 502 (1980) (promise must be "clear and unambiguous in its terms"). The same required specificity governs contracts. *Lessley v. Hardage*, 240 Kan. 72, Syl. ¶ 4, 727 P.2d 440 (1986) ("[F]or an agreement to be binding it must be sufficiently definite as to its terms and requirements to enable a court to determine what acts are to be performed and when performance is complete."). Were the law otherwise, a court might be required to fashion a specific performance remedy from a vague or indefinite

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<sup>7</sup> *Bouton v. Byers*, 50 Kan. App. 2d 34, 41-43, 321 P.3d 780 (2014), *rev. denied* 301 Kan. 1045 (2015).

promise in an equitable action based on promissory estoppel. The result would be an exercise in impermissible guesstimation.

Even if there was an agreement between the parties, claimant changed the terms of the agreement by agreeing to the earlier surgery. He did so without contacting respondent prior to changing his plans.

Finally, K.S.A. 2011 Supp. 44-510h(a) provides claimant shall be reimbursed for travel expenses pursuant to K.S.A. 2011 Supp. 44-515(a), which specifically sets forth how a claimant will be reimbursed for his travel expenses. *Bergstrom*<sup>8</sup> states: "When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be." The plain language of K.S.A. 2011 Supp. 44-515(a) is that claimant will be reimbursed for mileage, tolls, parking fees and \$15 per diem for each full day he is required to be away from his home. As outdated as the \$15 per diem may be, the Board is bound to follow the plain language of K.S.A. 2011 Supp. 44-515(a).

As required by the Workers Compensation Act, all members of the Board have considered the evidence and issues presented in this appeal.<sup>9</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board affirms the September 11, 2019, Post-Award Medical Order entered by Judge Moore, including the judge's award of \$662.25 in post-award attorney fees to claimant, but remands the matter to Judge Moore to consider claimant's request for additional attorney fees.

**IT IS SO ORDERED.**

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<sup>8</sup> *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, Syl. ¶ 1, 214 P.3d 676 (2009).

<sup>9</sup> K.S.A. 2018 Supp. 44-555c(j).

Dated this \_\_\_\_ day of February, 2020.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant (via OSCAR)

Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier (via OSCAR)

Honorable Bruce E. Moore, Administrative Law Judge